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GREENSPRINGS BAPTIST  
CHRISTIAN FELLOWSHIP TRUST

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GREENSPRINGS BAPTIST  
CHRISTIAN FELLOWSHIP TRUST,

Plaintiff,

v.

ROBERT MILLER, an individual;  
BARBARA MILLER, an individual;  
ANNE MILLER, an individual; JAMES  
P. CILLEY, an individual; MARK A.  
SCHMUCK, an individual; and  
TIMMERMAN, CILLEY &  
KOHLMANN, LLP,

Defendants.

CASE NO.

COMPLAINT FOR DAMAGES FOR  
MALICIOUS PROSECUTION OF  
CIVIL ACTION

DEMAND FOR JURY TRIAL

Plaintiff alleges as follows:

INTRODUCTION

1. This is an action for damages for malicious prosecution of a prior civil action in this Court, Miller, et al. v. Greensprings, et al., Case No. C 07-04776 JL, against the

1 former plaintiffs and the attorneys who represented the former plaintiffs in that  
2 underlying action. The prior action was (a) commenced by or at the direction of the  
3 defendants and was pursued to a legal termination in favor of the plaintiff, who was a  
4 defendant in the prior action; (b) brought without probable cause; and (c) initiated with  
5 malice. As a proximate result, plaintiff suffered damages within the jurisdictional limit of  
6 this Court.

#### 7 JURISDICTION

8 2. The jurisdiction of this Court is predicated on 28 U.S.C. § 1332, in that  
9 the matter in controversy exceeds the sum or value of \$75,000 and is between citizens of  
10 different States.

#### 11 VENUE

12 3. A substantial part of the events or omissions on which the claim is based  
13 occurred in San Francisco County, California. Venue is therefore proper under 28 U.S.C.  
14 § 1391(a)(2).

#### 15 INTRADISTRICT ASSIGNMENT

16 4. This matter should be assigned to the San Francisco Division or the Oakland  
17 Division, pursuant to Civil L.R. 3-2(d).

#### 18 PARTIES

19 5. Plaintiff GREENSPRINGS BAPTIST CHRISTIAN FELLOWSHIP TRUST  
20 (hereinafter referred to as "GREENSPRINGS") is a charitable religious trust organized  
21 and existing under the laws of the State of Oregon with its principal office in Lane  
22 County, Oregon.

23 6. On information and belief, defendants ROBERT MILLER, BARBARA  
24 MILLER and ANNE MILLER (collectively, the "MILLERS") are, and at all times  
25 mentioned in this Complaint were, citizens of the State of Hawaii.

26 7. On information and belief, defendants JAMES P. CILLEY ("CILLEY") and  
27 MARK A. SCHMUCK ("SCHMUCK") are, and at all times mentioned in this Complaint  
28 were, citizens of the State of California and attorneys and counselors at law duly licensed

1 to practice, and practicing, in the State of California and admitted to practice before this  
2 Court.

3 8. On information and belief, defendant TIMMERMAN, CILLEY &  
4 KOHLMANN, LLP ("TIMMERMAN"), formerly known as Timmerman & Cilley, LLP,  
5 is, and at all times mentioned in this Complaint was, a law firm organized and existing as  
6 a limited liability partnership under the laws of the State of California, having its  
7 principal place of business in San Jose, California, specializing in estate planning, probate  
8 and trust administration, and estate and trust litigation. In May of 2008, defendants  
9 CILLEY and SCHMUCK began to refer to the firm in e-mail communications with  
10 GREENSPRINGS' counsel as "TIMMERMAN, CILLEY & KOHLMANN, LLP", but  
11 continued to use the name "Timmerman & Cilley, LLP" on documents filed with this  
12 Court in the prior action.

13 9. On information and belief, defendant CILLEY is, and at all times mentioned in  
14 this Complaint was, a partner in, and at all times mentioned in this Complaint acted with  
15 the authorization, permission and consent of, defendant TIMMERMAN; on information  
16 and belief, defendant SCHMUCK is, and at all times mentioned in this Complaint was, an  
17 employee of, and at all times mentioned in this Complaint acted with the authorization,  
18 permission and consent of, defendant TIMMERMAN.

19 10. Plaintiff is informed and believes and thereon alleges that at all times herein  
20 mentioned defendants, and each of them, were the agents, servants, and employees of  
21 their co-defendants, and in doing the things hereinafter mentioned were acting in the  
22 scope of their authority as such agents, servants, and employees with the permission and  
23 consent of their co-defendants.

#### 24 GENERAL ALLEGATIONS

25 11. On or about August 17, 2007, defendants CILLEY, SCHMUCK and  
26 TIMMERMAN, as counsel of record for defendants BARBARA MILLER, as guardian  
27 of Molly Miller, and ANNE MILLER, initiated a civil action against plaintiff in the  
28 Superior Court of California for the County of San Mateo, BARBARA MILLER, as

1 guardian of Molly Miller, an individual; and ANNE MILLER, an individual, Plaintiffs, v.  
2 GREENSPRINGS BAPTIST CHRISTIAN FELLOWSHIP TRUST, a business entity of  
3 unknown form; CARLETON L. BRIGGS, an individual; CHRISTINE DILLON, an  
4 individual; DONALD BOHN, an individual; GRACE PARISH CHRISTIAN CHURCH,  
5 a business entity of unknown form; and DOES 1 through 50, inclusive, Defendants, Case  
6 No. CIV-465375. The complaint was for damages for breach of contract-promissory  
7 estoppel, conversion, fraud, for declaratory relief and for imposition of a constructive  
8 trust.

9 12. On or about September 13, 2007, defendants CILLEY, SCHMUCK and  
10 TIMMERMAN, on information and belief with the permission of defendants BARBARA  
11 MILLER, as guardian of Molly Miller, and ANNE MILLER, voluntarily dismissed  
12 Carleton L. Briggs as a defendant in the above-referenced action.

13 13. On or about September 17, 2007, the case was removed by GREENSPRINGS  
14 to this Court, BARBARA MILLER, as guardian of Molly Miller, an individual; and  
15 ANNE MILLER, an individual, Plaintiffs, v. GREENSPRINGS, et al., Defendants, Case  
16 No. C 07-04776 JL.

17 14. On October 31, 2007, GREENSPRINGS filed a motion to dismiss the  
18 complaint pursuant to FRCP 12(b)(6) for failure to state a claim. On March 24, 2008, the  
19 complaint of BARBARA MILLER, as guardian of Molly Miller, and ANNE MILLER  
20 was dismissed for failure to state a claim, as plaintiffs in that action could not show  
21 damages, consideration, reliance, or other elements of an enforceable contract or fraud.  
22 In sum, although the complaint alleged that defendants in the prior action Christine Dillon  
23 and Donald Bohn had promised money to certain charities, plaintiffs had alleged no facts  
24 which would give them any legal right to money, particularly from GREENSPRINGS.  
25 The Court gave BARBARA MILLER, as guardian for Molly Miller, and ANNE  
26 MILLER leave to amend their complaint, specifically ordering, in detail, how they had to  
27 address and correct the above-noted defects. A true and correct copy of the Order  
28 (Document 48 in the prior action, Miller, et al. v. Greensprings, et al., Case No. C 07-

04776 JL) is attached hereto as Exhibit "A" and by reference made a part hereof.

15. On March 28, 2008 defendants CILLEY, SCHMUCK and TIMMERMAN, as counsel of record for the MILLERS, filed a first amended complaint against plaintiff in this Court. The first amended complaint was, again, for damages for breach of contract-promissory estoppel, conversion, fraud, for declaratory relief, and for imposition of a constructive trust, plus newly added claims for specific performance and for damages for intentional interference with the right to inherit and negligent interference with the right to inherit. The first amended complaint added Carleton L. Briggs back in as a defendant. The first amended complaint also added new plaintiffs ROBERT MILLER and BARBARA MILLER, individually, without leave of court.

16. On April 17, 2008, GREENSPRINGS filed a motion to dismiss the first amended complaint pursuant to FRCP 12(b)(6) for failure to state a claim and a motion pursuant to FRCP 12(f) to strike the allegations adding new plaintiffs ROBERT MILLER and BARBARA MILLER, individually. On August 18, 2008, the Court dismissed the first amended complaint with prejudice because BARBARA MILLER, as guardian of Molly Miller, and ANNE MILLER had failed to address and correct the defects noted in the Court's earlier order. The Court also found that the addition of new plaintiffs ROBERT MILLER and BARBARA MILLER, individually, was improper, that the additional claim for specific performance lacked merit, and that the additional claims for intentional and negligent interference with the right to inherit had no basis in law or in fact. A true and correct copy of the Order (Document 98 in the prior action, Miller, et al. v. Greensprings, et al., Case No. C 07-04776 JL) is attached hereto as Exhibit "B" and by reference made a part hereof.

#### CLAIM

(Malicious Prosecution of Civil Action)

17. The allegations contained in paragraphs 1-16 are incorporated by reference as if fully set forth herein.

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1           18. Defendants CILLEY, SCHMUCK and TIMMERMAN acted without probable  
2 cause in initially bringing the above-mentioned action against plaintiff because, as a  
3 matter of law, no reasonable attorney would regard as tenable the prosecution of the  
4 claims contained in the above-referenced complaint, and/or they unreasonably neglected  
5 to research the law in making the determination to proceed against plaintiff. In ruling on  
6 the motion to dismiss the complaint for failure to state a claim, the Court gave specific  
7 and detailed instructions as to the factual elements that would have to be alleged in order  
8 to properly state a claim for each cause of action contained in the complaint.

9           19. Defendants CILLEY, SCHMUCK and TIMMERMAN acted without probable  
10 cause in continuing to prosecute the above-mentioned action against plaintiff following  
11 the dismissal of the complaint because, as a matter of law, no reasonable attorney would  
12 regard as tenable the prosecution of the claims contained in the above-referenced first  
13 amended complaint, and/or they unreasonably neglected to research the law in making the  
14 determination to continue to prosecute plaintiff. Defendants CILLEY, SCHMUCK and  
15 TIMMERMAN ignored the instructions of the Court in drafting the first amended  
16 complaint, which also failed to state a claim upon which relief could be granted.

17           20. Defendants BARBARA MILLER, as guardian for Molly Miller, ANNE  
18 MILLER, CILLEY, SCHMUCK and TIMMERMAN acted without probable cause in  
19 bringing the above-mentioned action against plaintiff because the claims asserted against  
20 plaintiff in the complaint were false, and defendants BARBARA MILLER, as guardian  
21 for Molly Miller, ANNE MILLER, CILLEY, SCHMUCK and TIMMERMAN knew of  
22 their falsity at the time they determined to file the complaint against plaintiff, or  
23 defendants BARBARA MILLER, as guardian for Molly Miller, ANNE MILLER,  
24 CILLEY, SCHMUCK and TIMMERMAN unreasonably neglected to investigate the  
25 facts in making their determination to file the complaint against plaintiff.

26           21. All defendants acted without probable cause in continuing to prosecute the  
27 above-mentioned action against plaintiff following the dismissal of the complaint,  
28 because the claims asserted against plaintiff in the first amended complaint were false,



1 and defendants knew of their falsity at the time they determined to file the first amended  
2 complaint against plaintiff, or defendants unreasonably neglected to investigate the facts  
3 in making their determination to file the first amended complaint against plaintiff.

4 22. Defendants BARBARA MILLER, as guardian for Molly Miller, ANNE  
5 MILLER, CILLEY, SCHMUCK and TIMMERMAN acted maliciously in bringing the  
6 above-mentioned action against plaintiff because defendants BARBARA MILLER, as  
7 guardian for Molly Miller, ANNE MILLER, CILLEY, SCHMUCK and TIMMERMAN  
8 filed the complaint knowing that the claims asserted therein against plaintiff were false  
9 and/or the proceedings were initiated for the purpose of depriving the plaintiff of the  
10 beneficial use of its property and/or to destroy plaintiff by depriving it of its tax-exempt  
11 status and/or the proceedings were initiated primarily because of hostility and ill will on  
12 the part of defendants BARBARA MILLER, as guardian for Molly Miller, and ANNE  
13 MILLER toward the plaintiff and/or the proceedings were initiated for the purpose of  
14 coercing plaintiff into settling with BARBARA MILLER, as guardian for Molly Miller,  
15 and ANNE MILLER, co-defendants in this action and plaintiffs in the prior action.

16 23. The malicious intent to coerce from the outset is evidenced by a letter from  
17 ROBERT MILLER and BARBARA MILLER, on behalf of Molly Miller, to Christine  
18 Dillon and Donald Bohn dated November 14, 2004, which was produced by BARBARA  
19 MILLER, as guardian for Molly Miller, and ANNE MILLER in initial disclosures. In  
20 that letter, ROBERT MILLER and BARBARA MILLER threatened an investigation of  
21 Dillon's and Bohn's handling of Elsie Turchen's estate unless payment of \$500,000 was  
22 made as directed by ROBERT MILLER and BARBARA MILLER. A true and correct  
23 copy of the threatening letter (Document 73 in the prior action, Miller, et al. v.  
24 Greensprings, et al., Case No. C 07-04776 JL) is attached hereto as Exhibit "C" and by  
25 reference made a part hereof.

26 24. All defendants acted maliciously in continuing to prosecute the above-  
27 mentioned action against plaintiff following dismissal of the complaint, because  
28 defendants filed and prosecuted the first amended complaint knowing that the claims

1 asserted therein against plaintiff were false and/or for the purpose of depriving the  
2 plaintiff of the beneficial use of its property and/or to destroy plaintiff by depriving it of  
3 its tax-exempt status and/or primarily because of hostility and ill will on the part of  
4 defendants the MILLERS toward the plaintiff and/or for the purpose of coercing plaintiff  
5 into settling with the MILLERS, co-defendants in this action and plaintiffs in the prior  
6 action.

7 25. As a proximate result of the institution of the above-mentioned action against  
8 plaintiff and, following dismissal of the complaint, the prosecution of the first amended  
9 complaint, plaintiff has been damaged.

10 26. As a further proximate result of the action initiated by defendants BARBARA  
11 MILLER, as guardian for Molly Miller, ANNE MILLER, CILLEY, SCHMUCK and  
12 TIMMERMAN and, following dismissal of the complaint, prosecuted against plaintiff by  
13 all defendants, plaintiff incurred attorneys' fees in defending against the action in excess  
14 of \$75,000.00.

15 27. At all times herein mentioned, defendants knew that the claims they asserted  
16 against plaintiff in the above-mentioned action were false, and/or defendants knew that  
17 the claims they asserted against plaintiff were legally untenable. Notwithstanding this  
18 knowledge, defendants subjected plaintiff to cruel and unjust hardship in conscious  
19 disregard of its rights, in that defendants CILLEY, SCHMUCK and TEMMERMAN  
20 abetted and encouraged defendants BARBARA MILLER, as guardian for Molly Miller,  
21 and ANNE MILLER to file fabricated and/or legally untenable claims against plaintiff,  
22 and defendants BARBARA MILLER, as guardian for Molly Miller, and ANNE MILLER  
23 filed such fabricated and/or legally untenable claims; and when their complaint was  
24 dismissed, defendants CILLEY, SCHMUCK and TEMMERMAN then abetted and  
25 encouraged defendants the MILLERS to file more fabricated and/or legally untenable  
26 claims against plaintiff in the first amended complaint, and defendants the MILLERS  
27 filed such fabricated and/or legally untenable claims, all to coerce plaintiff into settling so  
28 that defendants could reap substantial profits. These acts therefore justify the awarding of



1 punitive damages.

2  
3 WHEREFORE, plaintiff prays judgment against defendants, and each of them, as  
4 follows:

5 1. For attorneys' fees incurred to defend against the action in Miller, et al. v.  
6 Greensprings, et al., Case No. C 07-04776 JL, in excess of \$75,000, according to proof;

7 2. For general damages according to proof;

8 3. For punitive damages;

9 4. For costs of suit herein incurred; and

10 5. For such other and further relief as the Court may deem proper.

11  
12 Dated: March 6, 2009

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14   
15 CARLETON L. BRIGGS

16 Attorney for Plaintiff  
17 GREENSPRINGS BAPTIST CHRISTIAN  
18 FELLOWSHIP TRUST  
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DEMAND FOR JURY TRIAL

The plaintiff in the above-entitled action requests a trial by jury as provided by Amendment VII of the United States Constitution and by Rule 38 of the Federal Rules of Civil Procedure.

Dated: March 6, 2009

Respectfully submitted,

  
CARLETON L. BRIGGS

Attorney for Plaintiff  
GREENSPRINGS BAPTIST CHRISTIAN  
FELLOWSHIP TRUST

CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

Pursuant to Civil L.R. 3-16, the undersigned certifies that as of this date, other than the named parties, there is no such interest to report.

Dated: March 6, 2009

  
CARLETON L. BRIGGS

Attorney for Plaintiff  
GREENSPRINGS BAPTIST CHRISTIAN  
FELLOWSHIP TRUST

**EXHIBIT A**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Barbara Miller, et al.,

No. C 07-4776 JL

Plaintiffs,

v.

Greensprings Baptist Christian Fellowship  
Trust,

ORDER GRANTING DEFENDANT  
GREENSPRINGS' AND DEFENDANT  
BOHN'S 12(b)(6) MOTIONS TO DISMISS  
WITH LEAVE TO AMEND, AND  
DENYING WITHOUT PREJUDICE  
12((b)(7) MOTION TO DISMISS FOR  
FAILURE TO JOIN AN INDISPENSABLE  
PARTY

Defendants.

DOCKET # 7, 10

**Introduction**

Defendant Donald Bohn's and Greensprings Baptist Christian Fellowship Trust's motions to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(b)(7) came on for hearing. Carleton L. Briggs of Law Offices of Carleton L. Briggs and James Rice, associated in as Counsel, appearing on behalf of Defendant Greensprings Baptist Christian Fellowship Trust (Greensprings). James H. Hartnett of Hartnett, Smith & Associates appeared on behalf of defendant Donald Bohn. James P. Cilley, Esq. appeared on behalf of Plaintiff Barbara Miller.

1 IT IS HEREBY ORDERED that defendants' 12(b)(6) motion to dismiss for failure to  
2 state a claim be granted with leave to amend. Greenspring's 12(b)(7) motion is denied  
3 without prejudice.

#### 4 **Procedural and Factual Background**

5 Elsie Turchen, now deceased, was Molly Miller's natural great grandmother. Molly is  
6 Robert and Barbara Miller's adopted daughter. Robert and Barbara also have a natural  
7 daughter, Anne. Prior to her death, Elsie expressed in a November 23, 2000 letter what  
8 Miller alleges to be Elsie's intent to give her house, located at 325 Malcomb Avenue  
9 Belmont California, to Anne and Molly. Elsie died December 10, 2000.

10 Following Elsie's death, defendant Christine Dillon represented to Miller that she was  
11 the personal representative of the Estate of Elsie Turchen. Miller alleges that Dillon knew  
12 about Elsie's intended gift and that Dillon represented that Grace Parish Christian Church  
13 would pay \$500,000 to a charity or charities of Miller's choice on behalf of Anne and Molly.

14 In alleged reliance upon Dillon's representations, Miller did not make any claim  
15 against the Estate. Miller claims that the purpose of the payment was to prevent Miller  
16 from bringing a claim against the Estate for Elsie Turchen's home on Malcomb Avenue.  
17 Miller also claims that the purpose was to fulfill Elsie's intent to give a substantial gift to  
18 Molly and Anne. Miller does not explain or reconcile these different purposes.

19 Greensprings claims that Elsie Turchen had already given to it the property at 325  
20 Malcomb Ave. and has submitted with its pleadings a photocopy of a grant deed which  
21 shows that Elsie Turchen had given the property to Greensprings in January of 1999.

22 On August 11, 2002, defendant Donald Bohn issued two checks totaling \$500,000 to  
23 "First Hawaiian Title Company." The checks were issued to a title company because  
24 Miller's chosen charity, the Maui Preparatory Academy, was in the process of purchasing  
25 real property for use as a school and the \$500,000 was paid towards that purchase. The  
26 checks were drawn on an account owned by "Real Estate Trust," which Miller believes is a  
27 "dba" for defendant Greensprings.

28 Apparently, First Hawaiian Title Co. did not exist and Miller asked Defendants to  
reissue the check to First Hawaii Title Company. Miller did not hear back from Defendants

1 for some time and subsequently demanded that a check for the full amount of \$500,000 be  
2 made out to Maui Preparatory Academy. Miller received a \$500,000 cashier's check on  
3 January 10, 2005, made out to Maui Preparatory Academy.

4 On July 22, 2005, Miller requested that defendants Bohn and Dillon re-issue the  
5 check as three separate checks totaling \$500,000 to three new charities. On August 10,  
6 2005 Bohn allegedly told Miller the checks would be reissued the next day. At the same  
7 time, Miller wrote a letter to Attorney Briggs, who Miller believes is a member of the Board  
8 of Greensprings. The purpose was to explain why the three new checks were needed.  
9 The next day, Briggs wrote back and asked that the January 10, 2005 cashier's check be  
10 returned to Greensprings because of litigation against defendants Dillon, Bohn and  
11 Greensprings by Penny Anderson. Penny Anderson is Elsie Turchen's granddaughter and  
12 Molly Miller's birth mother. Briggs stated, by letter and later by phone, that in order to have  
13 the checks re-issued, a motion in the *Anderson v. Greensprings* litigation had to be filed.  
14 Miller returned the cashier's check to Briggs on August 16, 2005 in reliance on these  
15 representations. No other check has been issued to Miller.

16 Greensprings claims that as a result of the *Anderson* litigation, the \$500,000 was  
17 paid to the Estate. Defendants provided a photocopied check made out to the  
18 administrator of the Estate, Ramona Martinez, as proof of this. This is the last payment for  
19 \$500,000 made by Greensprings.

20 Miller subsequently initiated this litigation, claiming Breach of Contract - Promissory  
21 Estoppel, Conversion, Fraud, and seeking Declaratory Relief and the imposition of a  
22 Constructive Trust as a result of defendants' actions and representations to Miller. Miller  
23 now seeks the \$500,000 personally (on behalf of Molly and Anne).

## 24 25 26 27 Legal Analysis

### 28 I. Standard for Granting 12(b)(6) Motion to Dismiss for Failure to State a Claim



1 A motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure  
2 12(b)(6) is viewed with disfavor and is rarely granted. *Gilligan v. Jamco. Develop. Corp.*  
3 108 F.3d 246, 249 (9<sup>th</sup> Cir. 1997). In considering a motion to dismiss for failure to state a  
4 claim, the district court must treat all plaintiff's allegations of material fact as true, and must  
5 construe them in the light most favorable to the plaintiff. *Maduka v. Sunrise Hosp.*, 375  
6 F.3d 909, 911 (9<sup>th</sup> Cir. 2004). However, the court is not required to accept legal  
7 conclusions cast in the form of factual allegations if those conclusions cannot reasonably  
8 be drawn from the facts alleged. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9<sup>th</sup>  
9 Cir. 2001). To survive a motion to dismiss, the complaint must only allege sufficient facts to  
10 support a "claim for relief that is plausible on its face." *Bell Atlantic Corp v. Twombly*, 127  
11 S.Ct. 1955, 1974 (2007).

12 Dismissals for failure to state a claim under FRCP 12(b)(6) should be without  
13 prejudice to the plaintiff's ability to file an amended pleading. *Balistreri v. Pacifica Police*  
14 *Dep't*, 901 F.2d 696, 701 (9<sup>th</sup> Cir 1988). A district court should grant leave to amend if it  
15 appears at all possible that the plaintiff can correct the defect. *Id.* Indeed, the court should  
16 grant leave to amend even if the plaintiff makes no request to amend the pleading, unless  
17 the court determines that the pleading could not possibly be cured by the allegation of other  
18 facts. *Lira v. Herrera*, 427 F.3d 1164, 1169 (9<sup>th</sup> Cir. 2005). Amendment is futile only if no  
19 set of facts can be proved under the amendment to the pleadings that would constitute a  
20 valid and sufficient claim. *Miller v. Rykoff-Sexton Inc.*, 845 F.2d 209, 214 (9<sup>th</sup> Cir. 1988).

21 An order dismissing a complaint for failure to state a claim and giving the plaintiff  
22 leave to amend is not a final appealable judgment. A plaintiff who chooses not to amend  
23 must file a written notice of intent not to file an amended complaint. After this notice is filed,  
24 the district court may enter an order dismissing the entire action, which order is then  
25 appealable. *Lira v. Herrera*, 427 F3d 1164, 1169 (9<sup>th</sup> Cir. 2005); *Yourish v. Cal. Amplifier*,  
26 191 F.3d 983, 992 (9<sup>th</sup> Cir. 1999).

## 27 **II. Greensprings' and Bohn's 12(b)(6) Motions**

28 Each of Miller's causes of action requires a showing of damages. Miller's claim that  
she is entitled to the \$500,000 is not supported by her complaint, which alleges an

1 agreement that the \$500,000 be donated to a charity or charities of her choosing in the  
2 names of her children, Molly and Anne. If the money was to be given to charity under the  
3 terms of the agreement, then it was not her money and she has not suffered damages in  
4 the amount of \$500,000. Miller has not satisfied the element of damages for the causes of  
5 action she brings in her complaint. Consequently, all of Miller's causes of actions are  
6 missing an essential element. Defendants' motions to dismiss for failure to state a claim  
7 upon which relief can be granted should therefore granted. Miller is granted leave to  
8 amend her complaint.

9 In so amending, Miller should address several points. First, Miller must explain how  
10 and why she was damaged in the amount of \$500,000 if the alleged agreement with  
11 defendants was for a gift of that amount to a charity or charities. As pled, Miller has at  
12 most stated facts sufficient to show damages only if her breach of contract claim was  
13 based on a third-party donee beneficiary contract theory.

14 Second, Miller's breach of contract-promissory estoppel cause of action is deficient.  
15 Miller has not alleged what, if any, claims she would have had against Greensprings as a  
16 result of the decedent's gift of the house at Malcomb Ave to Greensprings. She has not  
17 alleged that the property was fraudulently obtained nor has she asserted any other basis  
18 for a claim on the Estate or against the defendants.

19 Also, as alleged, there does not appear to have been an enforceable agreement  
20 between the decedent and her great grandchildren for the gift of the house at 325 Malcomb  
21 Avenue, Belmont, California. Miller must explain how the decedent's apparent intent to  
22 give a gift to Anne and Molly provides Miller with grounds to bring a claim against either  
23 Greensprings or the Estate, or both.

24 Lastly, Miller may wish to further develop the factual record to explain: (1) why the  
25 \$500,000 went to the Estate or, the issues in the *Anderson v. Greensprings* litigation and  
26 their relevance to this case; (2) how reliance on Defendants' representations was  
27 reasonable, specifically, that reliance on Atty. Brigg's representations (on behalf of  
28 Greensprings) was reasonable *even after* learning of the *Anderson v. Greensprings*  
litigation; (3) what obligations Miller has to any charities as a result of the agreement with

1 Defendants; (4) why the Estate is NOT an indispensable party **OR** why Defendants should  
2 not be dropped from the lawsuit altogether if it is the Estate, and not the Defendants, that is  
3 in possession of the \$500,000; and (5) anything else Miller thinks is necessary to support or  
4 explain the causes of action in her amended complaint.

5 **III. Greensprings' 12(b)(7) motion**

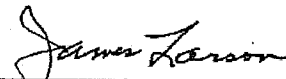
6 Greensprings' 12(b)(7) motion to dismiss for failure to join an indispensable party  
7 (the Estate of Elsie Turchen) could also be granted on the grounds that Miller has not  
8 shown she was damaged. Miller must first establish a right to the \$500,000 dollars. If Miller  
9 amends her complaint to show damages, then the 12(b)(7) motion could be addressed.

10 **Conclusion and Order**

11 Defendants' motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) is  
12 GRANTED WITH LEAVE TO AMEND. The Court does not therefore reach Greensprings'  
13 Rule 12(b)(7) motion, and denies it without prejudice.

14 IT IS SO ORDERED.

15 DATED: March 24,2008

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19 James Larson  
20 Chief Magistrate Judge  
21  
22  
23

24 G:\JLALL\CHAMBERS\CASES\CIVIL\07-4776\12(b)(6),(7) order.wpd  
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**EXHIBIT B**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Barbara Miller, et al.,

No. C 07-4776 JL

Plaintiffs,

**ORDER OF DISMISSAL  
Granting Docket Numbers 28, 29, 52,  
55, 56, and 77; Denying without  
prejudice Docket No. 54**

v.

Greensprings Baptist Christian Fellowship  
Trust,

Defendants.

**Introduction**

Plaintiffs in their complaint sued for breach of contract, conversion, fraud, declaratory relief, and promissory estoppel. The Court's jurisdiction derives from the parties' diversity of citizenship, as provided by 28 U.S.C. §1332. The property from which the dispute arises is located in this district. Plaintiffs are citizens of Hawaii and Defendants are citizens of California and Oregon. The case was initially filed in San Mateo County Superior Court and removed to this Court by Defendants pursuant to 28 U.S.C. §1441 and 1446. All parties consented to the jurisdiction of this Court pursuant to 28 U.S. Code §636(c) and Civil Local Rule 73.

The following motions came on for hearing:

1. Defendants' motion to dismiss the first amended complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(6) -

(Docket #s 28, 29, 56, 77 -Donald Bohn)(Docket # 52-Greensprings Baptist Christian Fellowship Trust);

2. Greensprings Baptist Christian Fellowship Trust's Motion to Strike allegations of First Amended Complaint (Docket # 55 )

3. Greensprings Baptist Christian Fellowship Trust's motion to dismiss for failure to join an indispensable party pursuant to FRCP 12(b)(7) (Docket # 54);

James P. Cilley, TEMMERMAN & CILLEY, LLP, appeared for Plaintiffs. Carleton L. Briggs, LAW OFFICES OF CARLETON L. BRIGGS, appeared for Defendant Greensprings Baptist Fellowship Trust - James H. Hartnett, HARTNETT, SMITH & ASSOCIATES, appeared for Defendant Donald Bohn. John B. Lytle appeared for Defendant Carleton L. Briggs.

### **Factual Background**

Plaintiffs Robert Miller; Barbara Miller, individually and as guardian ad litem for her adopted daughter Molly Miller; and Anne Miller, the natural daughter of Barbara and Robert Miller, have sued to recover, or obtain a declaration that they are entitled to, the sum of \$500,000. The complaint, as amended, alleges claims for breach of contract-promissory estoppel, conversion, fraud, declaratory relief, constructive trust, specific performance, intentional interference with right to inherit, and negligent interference with right to inherit. Plaintiffs' purported right to the \$500,000 in question initially arose from an alleged promise by the late Elsie G. Turchen (Molly Miller's natural great-grandmother) to make a gift to Plaintiffs Molly and Anne. The \$500,000 has been returned by Greensprings to the Estate of Elsie G. Turchen.

Before her death, Elsie Turchen expressed in writing her intent to give a substantial gift to Anne and Molly. In a letter to Barbara and Robert Miller dated November 23, 2000, she asked the Millers if they would "consider" a gift to Anne and Molly of a house located at 325 Malcolm [sic] Avenue, Belmont, California.

Elsie's November 23, 2000 letter, written to Barbara and Robert Miller, stated, in pertinent part:



1 "I would like to do something for your girls. I do not shop; and I  
2 don't want to send things that have to be exchanged or are not  
3 useful, so I have failed to do anything on either Annie's or Molly's  
4 birthdays.

5 Would you consider the gift of the house  
6 for them? Enclosed is the picture. . . .

7 It will go vacant approximately 2/1/2001.

8 As you know, I am very ill. . . ."

9 (FAC at ¶ 37)

10 The first amended complaint alleges that it was Elsie's clear intent to give the  
11 Malcolm [sic] Avenue house to Anne and Molly, but Elsie died 17 days later, on December  
12 10, 2000. Plaintiffs do not allege that the gift was completed. First Amended Complaint  
13 ("FAC"), ¶ 37.

14 After Elsie's death, defendant Christine Dillon, who had told Barbara Miller that  
15 she was the personal representative of Elsie's estate, said that Grace Parish Christian  
16 Church would pay \$500,000 to a charity or charities of Barbara and Robert Miller's  
17 choice on Anne and Molly's behalf. The complaint alleges that defendant Dillon knew  
18 of Elsie's intended gift to Anne and Molly and proposed the charitable payment so that  
19 Anne and Molly would not make a claim against Elsie's estate. FAC, ¶ 38.

20 On August 11, 2002, two checks totaling \$500,000 were issued to First Hawaiian  
21 Title Company. The checks were issued to a title company because the Millers' chosen  
22 charity, Maui Preparatory Academy, was in the process of buying real property for use as a  
23 school, and the \$500,000 was to be used for that purchase. The two checks were drawn on  
24 an account owned by Real Estate Trust, which plaintiffs believe is a "dba" for  
25 defendant Greensprings. The checks were signed by defendant Bohn, and "were intended  
26 to be performance on the agreement by defendant Dillon (and now by Defendant  
27 Greensprings) to fulfill Elsie Turchin's [sic] promise to make a gift to Anne and Molly as  
28 indicated in Elsie's November 23, 2000 letter." FAC, ¶ 39.

1 Barbara and Robert Miller later learned that there was no entity named First  
2 Hawaiian Title Company, and in an October 9, 2002 letter to defendants Bohn and Dillon,  
3 they asked that the checks be reissued in the name of First Hawaii Title Corporation.

4 After not hearing from Bohn and Dillon for some considerable time, in January 2005  
5 the Millers demanded that they reissue a check to Maui Preparatory Academy. On January  
6 10, 2005, defendant Bohn delivered to the Millers a cashier's check for \$500,000 made out  
7 to Maui Preparatory Academy. The complaint alleges that the purpose of making the check  
8 payable to Maui Preparatory Academy "was to make a gift to the Academy on behalf of  
9 Anne and Molly." FAC, ¶¶ 39- 40.

10 Many months after receiving the cashier's check payable to Maui Preparatory  
11 Academy, the Millers again asked defendants Bohn and Dillon to reissue the check, this  
12 time as three checks totaling \$500,000 payable to Stanford University, Seabury Hall, and  
13 West Maui Carden Academy. In a telephone conversation on August 10, 2005, Defendant  
14 Bohn told Barbara Miller that it would be done the next day. FAC, ¶ 42.

15 At the same time, Barbara Miller wrote a letter to Carleton L. Briggs, who plaintiffs  
16 believe is a member of defendant Greensprings' board of directors, to explain  
17 why the three checks were needed instead of one. The next day, Briggs wrote back to  
18 Barbara Miller asking that the \$500,000 cashier's check payable to Maui Preparatory  
19 Academy be returned because of litigation against Greensprings, Bohn, and Dillon by  
20 Penny D. Anderson, who is Elsie Turchen's granddaughter and Molly Miller's birth  
21 mother. Briggs's letter said that a motion would have to be made in the "*Anderson v.*  
22 *Greensprings*" litigation to have the checks reissued; that such a motion would be made  
23 with all possible haste; and that the \$500,000 would be maintained in a separate, interest-  
24 bearing account earmarked for the three charities named by the Millers. Barbara Miller  
25 returned the cashier's check on August 16, 2005, but no motion was ever made in the  
26 *Anderson v. Dillon* litigation to reissue the three checks, and Plaintiffs allege that the  
27 \$500,000 was never put in a separate, interest-bearing account earmarked for the  
28 charities. FAC, ¶¶ 43-44.

**Disposition of the \$500,000**

In August 2005, Barbara Miller returned the \$500,000 cashier's check payable to Maui Preparatory Academy to Greensprings' attorney, Carleton L. Briggs. Attorney Briggs subsequently paid the \$500,000 to the Estate of Elsie Turchen. FAC ¶ 44.

**Procedural Background**

This Court, on March 24, 2008, at Docket No. 48, granted Defendants' motions to dismiss for failure to state a claim, pursuant to FRCP 12(b)(6), but also granted leave to Plaintiffs to amend their complaint, ruling:

"Each of Miller's causes of action requires a showing of damages. Miller's claim that she is entitled to the \$500,000 is not supported by her complaint, which alleges an agreement that the \$500,000 be donated to a charity or charities of her choosing in the names of her children, Molly and Anne. If the money was to be given to charity under the terms of the agreement, then it was not her money and she has not suffered damages in the amount of \$500,000. Miller has not satisfied the element of damages for the causes of action she brings in her complaint. Consequently, all of Miller's causes of actions are missing an essential element. Defendants' motions to dismiss for failure to state a claim upon which relief can be granted should therefore granted. Miller is granted leave to amend her complaint."

(Order at 4:28-5:8; Docket No. 48, filed March 24, 2008)

The Court in its March 24 Order also addressed the issue of the Estate's possible status as an indispensable party, although it did not rule on that question. The Court expressly ordered Plaintiffs to amend their complaint thus:

"In so amending, Miller should address several points. First, Miller must explain how and why she was damaged in the amount of \$500,000 if the alleged agreement with defendants was for a gift of that amount to a charity or charities. As pled, Miller has at most stated facts sufficient to show damages only if her breach of contract claim was based on a third-party donee beneficiary contract theory.

Second, Miller's breach of contract-promissory estoppel cause of action is deficient. Miller has not alleged what, if any, claims she would have had against Greensprings as a result of the decedent's gift of the house at Malcomb Ave to Greensprings. She has not alleged that the property was fraudulently obtained nor has she asserted any other basis for a claim on the Estate or against the defendants.

Also, as alleged, there does not appear to have been an enforceable agreement between the decedent and her great grandchildren for the gift of the house at 325 Malcomb Avenue, Belmont, California. Miller must explain how the decedent's apparent intent to give a gift to Anne and Molly provides Miller with grounds to bring a claim against either Greensprings or the Estate, or both.

1 Lastly, Miller may wish to further develop the factual record to explain: (1) why the  
 2 \$500,000 went to the Estate or, the issues in the Anderson v. Greensprings litigation  
 3 and their relevance to this case; (2) how reliance on Defendants' representations  
 4 was reasonable, specifically, that reliance on Atty. Brigg's representations (on behalf  
 5 of Greensprings) was reasonable even after learning of the Anderson v.  
 6 Greensprings litigation; (3) what obligations Miller has to any charities as a result of  
 7 the agreement with Defendants; (4) why the Estate is NOT an indispensable party  
 8 OR why Defendants should not be dropped from the lawsuit altogether if it is the  
 9 Estate, and not the Defendants, that is in possession of the \$500,000; and (5)  
 10 anything else Miller thinks is necessary to support or explain the causes of action in  
 11 her amended complaint."

12 (Order at 5:9-6:4)

### 13 ANALYSIS

14 Plaintiffs fail to address adequately the issues raised in the Court's order and  
 15 consequently fail to heal the fatal defects in their complaint.

- 16 **1. Motion to strike allegations of First Amended Complaint**
- 17 **2. Motion to dismiss for failure to state a claim pursuant to FRCP 12(b)(6)**

18 The Court's Order to Plaintiffs granting them leave to amend their complaint does  
 19 not contemplate the addition of new plaintiffs or claims, but merely some adequate basis for  
 20 a finding of damages, of which there was none in the initial complaint. Plaintiffs try to add a  
 21 new plaintiff, Robert Miller, along with new causes of action: for specific performance, for  
 22 intentional interference with right to inherit, and for negligent interference with right to  
 23 inherit. Plaintiffs Robert and Barbara Miller for the first time allege damage to themselves.  
 24 They claim they pledged a \$200,000 donation to Seabury Hall in reliance on their receipt of  
 25 the \$500,000 check from Greensprings. However, this allegation fails for a number of  
 26 reasons, including that Seabury Hall is not pursuing them for the donation and that in fact  
 27 the entity which committed to the donation is the Miller Family Foundation, a lapsed non-  
 28 profit for which Plaintiffs have no responsibility.

### 29 Addition of New Plaintiffs and Claims

30 In the parties' briefs or arguments or the Court's Order granting leave to amend,  
 31 there was no discussion of the addition of new plaintiffs or claims. The Court's Order  
 32 stated that the complaint failed to satisfy the essential element of damages in that,

1 according to the allegations, the purported gift of \$500,000 was not to be given to any of  
2 the Millers, but was to go to charity. Thus, neither Anne Miller nor Molly Miller, nor  
3 Barbara Miller, as Molly's guardian ad litem, nor Robert Miller, the newly-added plaintiff,  
4 would have received the money under the terms of the alleged agreement. They have not  
5 suffered any damage, let alone damages of \$500,000. There was no claim in the original  
6 complaint on behalf of Robert Miller, Barbara Miller's husband, the father of Anne and  
7 Molly.

### 8 **Claim for Damages of \$200,000**

9 The first amended complaint adds Barbara and Robert Miller as plaintiffs in their  
10 individual capacities and alleges that, in reliance on the anticipated gift of \$200,000 by  
11 defendants to Seabury Hall, they personally pledged \$200,000 to Seabury Hall. However,  
12 the first amended complaint contains no allegation of a promise to pay money to or on  
13 behalf of Barbara or Robert Miller individually. Moreover, this allegation does nothing to  
14 cure the defect of the lack of damages for Anne and Molly Miller.

15 It appears from correspondence from Seabury Hall that the pledge on which  
16 plaintiffs rely was regarded by Seabury Hall as a commitment not by Barbara and Robert  
17 Miller individually, or by Anne and Molly Miller, but by the Miller Family Foundation, a  
18 separate legal entity not a party to this action. (Exhibit J to Def. Request for Judicial Notice)  
19 The Miller Family Foundation is a California corporation currently in suspended status, and  
20 thus unable to have its rights asserted by anyone. It further appears from the Seabury Hall  
21 letter that Barbara and Robert Miller face no personal liability if they fail to pay the pledge,  
22 that any negative impact would be limited to the Miller Family Foundation's name being  
23 removed from the list of donors on the school plaques. Arguably, this line of reasoning rests  
24 on disputed material facts and would be more appropriate for resolution on summary  
25 judgment, rather than a motion to dismiss. However, as discussed below, other factors  
26 militate for dismissal, regardless of the outcome of this part of the dispute.

27 Even if they could make out a case for a legal obligation on the part of  
28 Defendants to make the charitable gifts allegedly promised, the Miller's simply have no  
standing to bring a claim on behalf of Seabury Hall or any of the other third-party charities

1 who they allege are the donee-beneficiaries of Defendants' alleged promises. The new  
2 allegations do nothing to cure the defects that the Court previously directed Plaintiffs to  
3 address.

4 Further, amendments naming new plaintiffs are permissible only if there is no  
5 change in the claim being asserted. *Besig v. Dolphin Boating and Swimming Club*, 683  
6 F.2d 1271, 1278 (9th Cir. 1982). The addition of new plaintiffs with new claims does not  
7 relate back to the date of filing the original complaint. The two-year statute of limitations on  
8 the claim for breach of an oral contract ran on August 11, 2007, two years after plaintiffs  
9 were told by Carleton L. Briggs that the checks to plaintiffs' latest choice of charities, which  
10 allegedly had been promised unconditionally by defendant Bohn, would not be issued by  
11 Greensprings without prior approval of the court in *Anderson v. Dillon*. FAC ¶ 43, 15:8-23.  
12 The first amended complaint was not filed until March 28, 2008. Therefore any new claims  
13 by new plaintiffs are time-barred.

14 Plaintiffs add two new claims to their complaint, for which they have failed to  
15 establish the requisite elements, or even that such a claim is available, under existing law  
16 (the negligent and intentional interference with right to inherit claims). Nor have they  
17 alleged facts sufficient to support their old claims.

18 **Plaintiffs have failed to state the necessary elements for promissory estoppel.**

19 The required elements for promissory estoppel in California are . . . (1) a  
20 promise clear and unambiguous in its terms; (2) reliance by the party to whom  
21 the promise is made; (3) his reliance must be both reasonable and foreseeable; and (4) the  
22 party asserting the estoppel must be injured by his reliance. *Laks v. Coast Fed. Sav. &*  
23 *Loan Assn.*, 60 Cal.App.3d 885, 890 (1976) (citing *Thomson v. Internat. Alliance of Stage*  
24 *Employees*, 232 Cal.App.2d 446, 454 (1965)).

25 Plaintiffs have not met any of these requirements. Plaintiffs include (at FAC ¶ 43) a  
26 partial transcript of a conversation between Carleton L. Briggs and Barbara Miller which  
27 contradicts Plaintiffs' own assertions. Briggs told Barbara Miller that Christine Dillon and  
28 Donald Bohn did not have authority to bind Greensprings without the approval of its board  
of directors. While Briggs believed he would be able to obtain the board's approval, he did



1 not have authority to bind Greensprings without that approval. In addition, Briggs clearly  
2 told Barbara Miller that court approval in *Anderson v. Dillon* would also be required before  
3 issuance of the checks she was requesting.

4 These conditions preclude the possibility that there was a promise clear and  
5 unambiguous in its terms between Carleton L. Briggs and Barbara Miller, or between  
6 Greensprings and Barbara Miller, to pay \$500,000 to Plaintiffs or their designated charities.  
7 Nor, to supply consideration, can Plaintiffs rely on the offer by Elsie Turchen to make a gift  
8 to Anne and Molly Miller. Plaintiff's reliance on such a promise is unreasonable, given  
9 Brigg's statements to Barbara Miller.

10 A valid gift requires (1) intent to make an unconditional gift; (2) intent to make a  
11 present, rather than a future gift; (3) an actual or symbolic delivery, that is that the donor  
12 relinquish control of the property; and (4) that the donee accept the gift. *U.S. v. Alcaraz-*  
13 *Garcia*, 79 F.3d 769 (9<sup>th</sup> Cir. 1996). At most, the letter from Elsie Turchen evidences an  
14 intended gift that was not completed before her death and is therefore void.

15 **Plaintiffs' forbearance from initiating a claim against the Estate or an**  
16 **investigation of Dillon and Bohn does not provide the requisite elements**  
17 **to enforce the alleged contract.**

18 Plaintiffs allege that they refrained from filing a creditor's claim or making a claim  
19 against the Estate of Elsie Turchen in reliance on Greensprings' alleged promise to pay  
20 \$500,000 to charities of their choice. Plaintiffs' Opp. to Motion to Dismiss, 9:15-19.

21 Plaintiffs Anne and Molly Miller (there is no allegation in the first amended complaint  
22 of a promise to pay anything to or on behalf of Barbara and Robert Miller individually, or  
23 their foundation) state that their reliance on alleged representations by Donald Bohn on  
24 July 22, 2005, and by Carleton L. Briggs on August 11, 2005, is the basis for their cause of  
25 action for breach of contract, in that it created an estoppel as a result of their losing the  
26 opportunity to pursue a claim against the Estate. Plaintiffs also cite their reliance on  
27 promises by Defendant Christine Dillon as the basis for a claim for fraud, their damages  
28 also arising from their forbearance to file a claim against the Turchen Estate.

1 "Consideration may be forbearance to sue on a claim, extension of time, or any  
2 other giving up of a legal right, in consideration of some promise." (1 Witkin, Summary of  
3 Cal. Law (10th ed. 2005) Contracts, § 211, p. 246, italics added.) But where a duty is  
4 imposed by law, "the promise to perform it is obviously not good consideration." (Id., § 219,  
5 p. 253.)

6 The offeree's consideration for the offeror's promise must actually be bargained for  
7 in exchange for the promise. *Saks v. Charity Mission Baptist Church*, 90 Cal.App.4th 1116,  
8 1135 (2001). This is the essence of a contract - a mutual bargain. With respect to  
9 forbearance, it constitutes consideration only if the agreement or consent to forbear is  
10 given in exchange for the offeror's promise. *Tiffany & Co. v. Spreckels*, 202 Cal. 778, 790  
11 (1927) [forbearance to sue on a claim must be in pursuance of an agreement; if the party is  
12 not bound to forbear and can institute suit at any time without breaching the parties'  
13 bargain, mere forbearance is not consideration]; *Wine Packing Corp. v. Voss*, 37  
14 Cal.App.2d 528, 538 (1940) [same]. In Elliott on Contracts, section 235, it is said: "If the  
15 claim threatened to be enforced is invalid or worthless, a promise not to attempt to enforce  
16 or to refrain from making trouble concerning it is not a consideration recognized by the law  
17 as valuable." (cited in *City Street Imp. Co. v. Pearson*, 181 Cal. 640, 651 (1919); overruled  
18 on other grounds at 63 Cal. 2d 584, 593 (1965).

19 Forbearance to pursue a claim that is wholly void cannot provide good consideration  
20 to enforce another promise. *City Street Improvement Co.*, *supra*; 1 Witkin, SUMMARY OF  
21 CALIFORNIA LAW (10th ed. 2007) "Contracts" § 211, at 253. Plaintiffs have not addressed  
22 this issue, other than now to assert without any support, and in spite of this Court's  
23 direction, that the validity of Elsie Turchen's alleged gift is irrelevant. (Pltf Opp. To Def  
24 12(b)(7) motion at 3:20-23, 4:11-12). However, Plaintiffs cannot escape the fact that  
25 forbearance from initiating a claim in the Estate proceedings provides no "consideration" to  
26 enforce the alleged promise by Defendants, because any claim of Plaintiffs against the  
27 Estate was wholly void.

28

1 Furthermore, Defendant Greensprings contends that the November 14, 2004 letter  
2 from Barbara and Robert Miller to defendants Christine Dillon and Donald Bohn (Exhibit I of  
3 the Request for Judicial Notice to Def. 12(b)(6) motion) constituted a threat. The letter  
4 stated that, if defendants Dillon and Bohn did not issue a check for \$500,000 as plaintiffs  
5 directed, "you will be forcing us to commence an investigation of your handling of Grandma  
6 Teddy's estate." An agreement made under duress or threat is voidable. See REST.2D,  
7 CONTRACTS § 175; 28 WILLISTON ON CONTRACTS (4th ed. 1990) § 71:8; *Marriage of*  
8 *Gonzales*, 57 Cal.App.3d 736, 743 (1976).

9 Plaintiffs contend that this letter was not a threat but "merely an attempt to get the  
10 Defendants to make the \$500,000.00 checks out to the right payee." Plaintiff's  
11 Opposition, 11: 26-27. Again, the question whether Plaintiffs' threatened Defendants might  
12 best be resolved on summary judgment but the complete lack of consideration for  
13 Defendants' promise makes duress or threat unnecessary as grounds for dismissal.

14 Neither can Plaintiffs credibly claim that any action by Defendants caused them to  
15 miss the statute of limitations. When the gist of an action is fraud, regardless of the form,  
16 the three-year period of limitation prescribed by Code of Civil Procedure § 338(d) applies,  
17 and this limitation period applies in an action, based on fraud, to establish a constructive  
18 trust. *Security First Nat'l Bank v. Ross*, 214 Cal.App.2d 424, 429-430 (1963). Plaintiffs  
19 allege that Barbara Miller was defrauded into returning the \$500,000 check in August of  
20 2005, so the applicable limitation period has not yet run on this claim .

21 **Plaintiffs' argument concerning the contract's illegality misses the point.**

22 Greensprings argues that, because its payment of \$500,000 to plaintiffs would  
23 violate applicable tax laws, it would disqualify Greensprings as a tax-exempt organization.  
24 Not only would the alleged contract be an act beyond the powers of Greensprings' trustee,  
25 it would be illegal. Plaintiffs attempt to get around this by asking for specific performance,  
26 i.e., payment directly to the designated charities. However, payment of another's pledge to  
27 charity is not a charitable gift and is not eligible for the payor's gift tax charitable deduction.  
28 The payment of that pledge is deemed to be a gift to the person who made the pledge.  
Rev. Rul. 81-110, 1981-1 CB 479.

1 Plaintiffs allege that Greensprings promised to issue checks totaling \$500,000, as  
2 Plaintiffs directed, in the names of Anne and Molly Miller, including \$200,000 to Seabury  
3 Hall. Plaintiffs Barbara and Robert Miller argue that they relied on this promise when they  
4 pledged \$200,000 to Seabury Hall. Now they are suing to make Greensprings pay their  
5 pledge. Plaintiffs do not dispute that this would be an *ultra vires* and illegal act, as it would  
6 not be a legal and proper charitable gift by Greensprings. But Plaintiffs argue that the only  
7 consequence of that illegality would be that Greensprings could lose its tax-exempt status  
8 and be required to report and pay income tax. Plaintiffs argue that they are completely  
9 innocent and that there would be no unjust enrichment to any party if the alleged contract is  
10 enforced, but that their forfeiture of the \$500,000 would be a "disproportionately harsh"  
11 result to them. Plaintiffs' Opposition, 13:14-21.

12 Plaintiffs' "unjust enrichment" argument misses the key point: on the one hand, the  
13 requested relief would not only cost Greensprings a second \$500,000, in addition to the  
14 \$500,000 it paid the to estate of Elsie Turchen, but it would be contrary to Greensprings'  
15 purposes, in excess of its trustee's powers, and would destroy Greensprings through the  
16 loss of its tax-exempt status. On the other hand, Plaintiffs have shown no enforceable  
17 entitlement to the \$500,000 and, rather than suffer any forfeiture or harsh result, Plaintiffs  
18 themselves will be no better or worse off, whether or not the requested charitable donations  
19 are made.

20 **Plaintiffs' breach of contract claim is time-barred.**

21 Code of Civil Procedure § 339 provides that an action on an oral contract must be  
22 brought within two years. Plaintiffs' breach of contract claim is based on a series of  
23 alleged oral representations that occurred between 2002 and 2005. The final acts in this  
24 series occurred on August 10, 2005, when Donald Bohn allegedly agreed to issue new  
25 checks totaling \$500,000 the next day (FAC ¶ 42), and on August 11, 2005, when Carleton  
26 L. Briggs requested the return of the \$500,000 cashier's check that Greensprings had  
27 issued to Maui Preparatory Academy, represented that a motion would be made in the  
28 *Anderson v. Dillon* litigation for issuance of checks to the Millers' latest choice of charities,  
and stated that the \$500,000 would be maintained in a separate, interest-bearing account.

1 FAC ¶ 44.

2 Plaintiffs' complaint in this action was filed on August 17, 2007, and their first  
3 amended complaint was filed on March 28, 2008, each after the two-year statute of  
4 limitations on breach of the alleged oral contract had run, on August 10, 2007.

5 Plaintiffs argue that a claim does not accrue until the breach occurs, and that their  
6 claim for breach of the alleged oral contract did not accrue until August 15, 2007, at the  
7 earliest, the date when the *Anderson v. Dillon* litigation was dismissed and therefore  
8 Greensprings could no longer file a motion in the case. However, the breach, if any, must  
9 have occurred on August 11, 2005, when Plaintiffs were told by Briggs that Greensprings  
10 would not issue the checks they had requested, and as had been unconditionally promised  
11 by Bohn on August 10, 2005, without prior approval of the court in *Anderson v. Dillon*. FAC  
12 ¶ 43, 15:8-23. Their claim, if any, must be deemed to have accrued then for purposes of  
13 the two-year statute of limitations.

14 **The amended complaint fails to establish the essential elements of conversion.**

15 To state a claim for conversion, plaintiffs must show ownership or right to  
16 possession of the tangible property at the time of the alleged taking or interference with  
17 the property. *Otworth v. Southern Pac. Transp. Co.*, 166 Cal.App.3d 452, 458 (1985); 5  
18 Witkin, CALIFORNIA PROCEDURE (4th ed. 1997) "Pleading," § 660, at 116. Here,  
19 however, none of the cashier's checks in question were ever made out to Plaintiffs. Their  
20 inability to establish that they themselves were entitled to receive the sum of \$500,000 is  
21 fatal to the claim that Greensprings "converted" the money. Plaintiffs acknowledge that  
22 Greensprings paid that specific, identifiable fund over to the Estate of Elsie Turchen.

23 Thus, their contention in opposition to the related motion under Rule 12(b)(7) that  
24 the Estate is not even "necessary" to a full and fair resolution of this matter is difficult to  
25 understand. At any rate, Plaintiffs have not stated a claim for conversion and, under the  
26 facts they allege, cannot prevail.

27 **Plaintiffs cannot establish justifiable reliance or damages required for fraud.**

28 In its dismissal order, the Court specifically directed Plaintiffs to address "how  
reliance upon Defendants' representations (on behalf of Greensprings) was reasonable

1 even after learning of the *Anderson v. Greensprings* litigation.” (Referring to *Anderson v.*  
2 *Dillon*). Reasonable or justifiable reliance is an essential element necessary to establish a  
3 claim for fraud. 5 Witkin, SUMMARY OF CALIFORNIA LAW (10th ed. 2005) “Torts,” § 772,  
4 at 1121. Plaintiffs argue that they were “absolutely reasonable” in relying on the alleged  
5 representations that Greensprings would pay the \$500,000 as instructed because “if one  
6 believes that his claim is going to be paid in full without any court intervention, it would be a  
7 waste of time and money to prepare papers in order to enforce any claim in court.”  
8 Plaintiffs’ Opp. 9:20-22.

9 This contention fails to address the Court’s directive. It simply was not reasonable  
10 for Plaintiffs to refrain from filing any kind of claim in the probate proceeding, when their  
11 claim to the \$500,000 was based on an intended testamentary gift (which they now allege  
12 they had a right to inherit), or from intervening in the *Anderson v. Dillon* litigation, where  
13 they knew the ownership of the separate, identifiable fund of \$500,000 in the Greensprings  
14 account was to be determined, whatever Greensprings might want. They failed to take the  
15 necessary steps to protect their alleged interest.

16 The first amended complaint quotes at length the August 11, 2005 telephone  
17 conversation between plaintiff Barbara Miller and Carleton L. Briggs. Briggs clearly  
18 advised Barbara Miller that Donald Bohn and Christine Dillon had lacked authority to  
19 issue the previous checks and that they had acted improperly without authorization from  
20 Greensprings’ board of directors. FAC ¶ 43, 14:22-15:3. Moreover, he expressly stated  
21 that court authorization would be necessary before any other checks could be issued. FAC  
22 ¶ 43, 15:8-23. Further, Greensprings’ board of directors would have to ratify the acts of  
23 Donald Bohn or Christine Dillon. FAC ¶ 43, 15:17-19. Thus, it was not reasonable for  
24 Plaintiffs to interpret, and then to rely upon, these representations as an unconditional  
25 “promise” to pay the charities, let alone the Plaintiffs, the \$500,000 fund. Finally, as  
26 previously discussed, Plaintiffs’ failure to establish the requisite element of damages is also  
27 fatal to their fraud claim.

28



1           **The facts alleged do not warrant imposition of a constructive trust.**

2           Plaintiffs ask the Court to impose a constructive trust on the grounds that  
3           Greensprings has wrongfully retained assets (specifically \$500,000) which rightfully belong  
4           to Anne and Molly Miller. They argue that these assets are Anne and Molly Miller's by virtue  
5           of Greensprings' issuing checks in the names of the chosen charities as directed by the  
6           Millers as a substitute for Elsie Turchen's gift to them. Plaintiff's Opposition, 18:14-17.

7           Constructive trust is a remedy used by a court of equity to compel the transfer of  
8           property by one who has possesses it but is not justly entitled to it, to the person entitled to  
9           it. 13 Witkin, SUMMARY OF CALIFORNIA LAW (10th ed. 2005) "Trusts" § 319 at 892.

10          Plaintiffs' argument that Greensprings has "retained" the \$500,000, directly contradicts the  
11          allegation (at FAC ¶ 44) that Greensprings transferred the \$500,000 to the Estate of Elsie  
12          Turchen. Greensprings doesn't have it, and so cannot be compelled to transfer it.

13           **Plaintiffs' rationale for specific performance is flawed.**

14          Plaintiffs now ask the Court to grant "specific performance" under the rationale that  
15          "Defendants are directly responsible for the Plaintiffs' inability to file a claim in the  
16          probate proceeding or participate in the *Anderson v. Dillon* matter because of their false  
17          representations that the money would be paid." Plaintiffs' Opposition, 19:3-5. However,  
18          an agreement to perform an act which the party does not have the power lawfully to  
19          perform when required to do so cannot be specifically enforced. Civ. Code § 3390(3). A  
20          court will not lend its aid to give effect to a contract that is illegal, whether it violates the  
21          common law or a statute, either expressly or by implication. *Kremer v. Earl*, 91 Cal. 112,  
22          117 (1891).

23          It is undisputed that, as Plaintiffs were advised by Briggs on August 11, 2005, the  
24          court in *Anderson v. Dillon* had jurisdiction over the \$500,000 fund in dispute, so  
25          Greensprings had no lawful power to issue replacement checks as Bohn had promised on  
26          August 10, 2005. Further, as is described supra, the payment of a charitable pledge of  
27          another party by Greensprings, a 501(c)(3) organization, would violate applicable tax laws.

28

1 Plaintiffs knew that the rights to the \$500,000 was being determined in *Anderson v.*  
2 *Dillon*, and they are responsible for their own decision not to participate in that litigation.  
3 Plaintiffs Barbara and Robert Miller are also responsible for their unilateral decision to  
4 make an unconditional pledge to Seabury Hall before the court in *Anderson v. Dillon* had  
5 determined the fate of the fund they allegedly were relying on to pay it.

6 **Plaintiffs' interference-with-right-to-inherit claims are not founded in law or fact.**

7 Plaintiffs' first amended complaint includes new claims for intentional and  
8 negligent "interference with right to inherit."

9 These claims cannot state a claim for relief because Plaintiffs had no right to inherit  
10 from Elsie Turchen, whether by her will or by the laws of intestacy, and no such claims  
11 have been recognized under California or Hawaii law. California Probate Code § 6451  
12 provides that adoption severs the relationship of parent and child between an adopted  
13 person and that person's natural parent. Plaintiffs allege that Elsie Turchen died intestate.  
14 But if the Estate of Elsie Turchen were distributed under the laws of intestate succession,  
15 neither Molly Miller, whose inheritance rights through her natural parents were severed by  
16 her adoption, nor Anne Miller, who was no relation to Elsie Turchen, would have any right  
17 to inherit from Elsie Turchen.

18 Plaintiffs claim that Elsie Turchen intended to give a gift to Molly and Anne Miller,  
19 and she certainly may have. However, that gift was never completed before her death.  
20 Her will (produced to plaintiffs in initial disclosure and attached as Exhibit K to the  
21 Request for Judicial Notice in support of Defendants' motion to dismiss) does not provide  
22 for the proposed gift. Since Anne or Molly Miller also have no right to inherit from Elsie  
23 Turchen's Estate under the law of intestacy, there simply were no "rights to inherit" to be  
24 interfered with by Defendants.

25 Furthermore, neither California nor Hawaii ever has recognized such claims. "The  
26 second count suggested a theory—recognized in several states but not previously  
27 validated in California—of intentional interference with an expected inheritance or gift."  
28 *Hagen v. Hickenbottom*, 41 Cal.App.4th 168, 173 (1995). *Hagen* did not further address the  
theory and certainly did not adopt it, and defendant Greensprings can find no Hawaii case

1 or statute which addresses it. Thus, there is no basis in law for these claims.

2 **Conclusion re Motions to Strike and to Dismiss**

3 The facts alleged in Plaintiffs' first amended complaint show that they are not now,  
4 nor ever were, entitled to the claimed \$500,000. They never received it as a gift, and if the  
5 promises alleged in the first amended complaint had been performed, the \$500,000 would  
6 belong to a charity or charities, not to Plaintiffs. Plaintiffs do not allege that they are  
7 authorized to sue Defendants on behalf of any of the multiple sets of charities to which  
8 defendants allegedly promised to make gifts. On the facts alleged, Defendants have not  
9 damaged plaintiffs in the sum of \$200,000, \$500,000, or any amount. Even if all their  
10 allegations concerning Defendants are taken as true, Plaintiffs cannot prove any set of  
11 facts that would entitle them to relief. Accordingly, Greensprings' motion to strike and to  
12 dismiss Plaintiffs' First Amended Complaint is hereby granted without leave to amend.

13 **3. Motion by Greensprings Baptist Christian Fellowship Trust to dismiss**  
14 **for failure to join an indispensable party**

15 Defendant Greensprings Baptist Christian Fellowship Trust moves the Court to  
16 dismiss this action on the ground that the Estate of Elsie Turchen is a party the joinder of  
17 which is indispensable to this action's just adjudication, and that the Estate has not been  
18 made a party to it.

19 Because the Court grants the motion to strike the claims of the First Amended  
20 Complaint, and dismisses the complaint without leave to amend, the Court will not reach  
21 the issue of whether the Estate of Elsie Turchen is an indispensable party to this action.  
22 The motion to dismiss under FRCP 12(b)(7)(Docket No. 54) is therefore denied without  
23 prejudice.

24 **Summary, Conclusion, and Order**

25 As Elsie Turchen was dying she apparently wanted to do something for her great-  
26 granddaughters, Molly and Anne. Molly was her granddaughter Penny's child, who had  
27 been given up for adoption. Anne was the child of Molly's adoptive parents. Elsie said in  
28 her letter that she had been too busy to do much for the girls. She wrote a letter to the

1 girls' parents, Robert and Barbara. Would the gift of a house be all right with them? She  
2 had one in mind, and enclosed a photo. Two and a half weeks later, Elsie died.

3 What ensued was a complicated legal tangle. Penny, Molly's birth mother, contested  
4 Elsie's will and sued in state court. The state lawsuit was settled.

5 Molly and Anne's parents did not join in the lawsuit or make a claim against Elsie's  
6 estate. Greensprings was willing at first to make a donation to charities of their choice.

7 Over several years, checks were written and re-written, sent back, replaced, and finally  
8 returned to the Estate. Molly and Anne's parents ultimately received nothing from either  
9 Greensprings or Elsie's estate. They sued in this Court.

10 Plaintiffs claim two kinds of damages: forbearance to file a claim against Elsie's  
11 estate, and their liability for a pledge to Seabury Hall of \$200,000. They argue that they  
12 gave up their opportunity to receive something from the Estate, in exchange for  
13 Greensprings' promise to donate to charities on their behalf. They argue that they promised  
14 a donation to Seabury Hall based on Greensprings' promise to them.

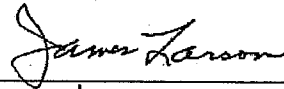
15 This Court concludes that none of this amounts to a cause of action. When Molly  
16 was adopted, her legal ties to Elsie were severed. Even if the will, which left her nothing,  
17 was invalidated, the law of intestate succession would also have given her nothing. Anne  
18 and her parents had no legal connection to Elsie. Even if Elsie's proposal in the letter  
19 amounted to a promise of a gift, the gift was never completed. The promise was not  
20 enforceable. There was no valid claim on that basis available to Plaintiffs against Elsie's  
21 estate. So the Plaintiffs' forbearance to file a claim against the Estate did not amount to  
22 consideration for Greensprings' promise to donate on their behalf. Their forbearance was  
23 worthless, since they had no viable claim against Elsie's estate. Their second claim, for  
24 their liability for the pledge to Seabury Hall, was not based on any reasonable reliance on a  
25 promise by Greensprings. The promise, if there was one, was to donate to charities,  
26 including Seabury Hall, but not to Plaintiffs. Plaintiffs never had possession or a promise of  
27 possession of any money.

28

1 Accordingly, Defendants' motions to strike and to dismiss pursuant to FRCP 12(b)(6)  
2 are granted, Plaintiffs' First Amended Complaint is dismissed. The motion for failure to join  
3 an indispensable party pursuant to FRCP 12(b)(7) is denied without prejudice. Plaintiffs  
4 shall take nothing on their complaint. Parties to bear their own costs. The Clerk shall close  
5 the file.

6 IT IS SO ORDERED.

7 DATED: August 18, 2008



James Larson  
Chief Magistrate Judge

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13 G:\JLALL\CHAMBERS\CASES\CIVIL\07-4776\Order Final no estate 28, 29, 52, 54, 55, 56, 77 .wpd  
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**EXHIBIT C**

November 14, 2004

Ms. Christine Dillon and  
Mr. Don Bohn  
Ward Anderson Realty  
407 South B Street  
San Mateo, Ca. 94401-4118

Dear Christine & Don:

We realize that it has been close to two years since our last contact. The reason for that being that at the same time you sent the Agreement between MPA and the Grace Parish Christian Church, the native Hawaiians sought and were successful in stopping Peter Martin from subdividing the land the school would be purchasing. Subsequently, we were back at Square One when the property owned by Maui Land & Pine became an option again. This property consists of 14.9 acres and includes 7 huge buildings including a large cafeteria. These buildings had been previously used as a Dorm Site for the Pineapple Migrant Workers. This land has a view of the ocean as well as the West Maui Mountains and since it was once a school long ago it has the feel of a School Campus. To make a long story short, after long and tedious negotiations MPA was able to secure this land for \$100.00 due to the changing of the guard at ML&P. The new CEO recognized the importance of a much needed school on the West Side and basically donated the land to MPA. The bottom line now is the school has the property and now needs to raise \$4 million for the renovation of the existing buildings into first rate classrooms.

You left us in quite an embarrassing position the last time by first issuing two checks one in the amount of \$497,000.00 and the other in the amount of \$3,000.00 neither one of them originating from the Grace Parish Church. I can't begin to tell you how happy the MPA school board was to receive that donation. That was until they realized you had issued the checks to a non-existent Title Company rendering the checks valueless. The embarrassment continued when we hired an attorney to work with Grace Parish Church and a Mr. John Wyse as President of Grace Parish Church on the Land Purchase Agreement you sent to MPA. Not only could the attorney not find any listing of a Grace Parish Church nor could he find it's President, Mr. John Wyse. He informed MPA that this was a non-existent entity, the details of which were very suspicious to say the least. Such behavior would tend to suggest that you have something to hide and that more importantly you are afraid of any inquiry that might result in discovery.

As you are well aware, this entire effort on our part is our attempt to provide a decent education for our daughter and Elsie G. Turchin and Ward D. Anderson's grandchild Molly without the added hardship of a three hour a day commute on a dangerous road. This is what Teddy and Ward would have wanted for Molly and I have the documentation to prove it. We can afford to pay the tuition but not build the school ourselves. As Molly's education is dependent on the success of MPA as her only school alternative we will ask both of you again for the last time to issue a check in the amount



of \$500,000.00 payable to Maui Preparatory Academy c/o Molly Miller. (This time, however, without the embarrassment that went along with your previous attempts at trying to appear as having done something but in reality did not) This money represents the fair market value (according to the appraisal you told us you had done) of the home at 325 Malcolm, Belmont, Ca. that Teddy was about to give to Molly and Annie on her deathbed. This was also the verbal agreement that you had come to with us regarding this matter and that is why you issued the checks for \$497,000.00 and \$3,000.00 respectively to honor that agreement. You both know that this is the right thing to do but if you should decide not to you will be forcing us to commence an investigation of your handling of Grandma Teddy's estate if for no other reason than to find out the reason for your peculiar behavior and just what it is that you are trying to hide with respect to Grandma Teddy's along with Grandpa Ward's respective estates. This is the last thing that we want to embark on but we will because we believe that we owe it to Grandma to see that her last wish regarding this matter is fulfilled. We look forward to hearing from you. If you need us to provide any documentation other than what we are enclosing we will endeavor to do so and we look forward to hearing from you one way or the other no later than November 30, 2004.

Sincerely,

Bob & Barbara Miller  
On behalf of Molly Miller